NO. 48473-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRADLEY KNOX,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael Evans, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1319
Winthrop, WA 98862
(509) 996-3959

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

ASSIGNMENTS OF ERROR

1. Mr. Knox's right to a public trial was violated by closure of a courtroom during the playing of 2 hours and 15 minutes of a recorded body wire admitted into evidence but not otherwise played in open court.

2. If the State substantially prevails on appeal, any request for appellate costs should be denied.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the First, Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution, a criminal trial must be administered openly and publicly. Violation of that right is a structural error which results in reversal of the defendant's conviction. Here the trial court closed the courtroom without conducting a *Bone-Club* analysis while the jury heard, at its request, a body wire recording, 2 hours and 15 minutes of which, although admitted into evidence, had not been played in open court. Did the closure of the courtroom violate Mr. Knox's constitutionally protected right to an open and public trial necessitating reversal of Mr. Knox's convictions?

2. Whether Mr. Knox should have to pay appellate costs if he does not substantially prevail on appeal and the State requests costs?

STATEMENT OF THE CASE

Mr. Knox faced many charges at trial: possession of methamphetamine with intent to deliver; unlawful possession of a firearm in the first degree (2 counts); bail jumping; unlawful imprisonment; and solicitation to commit murder in the first degree (three counts). CP 1-6, 78-84; 149-51.

As evidence of solicitation to commit first-degree murder, the State played, in open court with the jury present, up to 15 minutes of a 2.5 hour body wire recording made in the Cowlitz County Jail. RP Vol. 5 at 580-82. The body wire recorded a discussion between inmates Otis Pippen and Brad Knox. RP Vol. 5 at 558, 577-82. Mr. Knox did not object to the playing of the body wire. RP Vol. 5 at 672. Also without objection, the court admitted the disk on which the entire conversation was recorded. RP Vol. 5 at 582.

During its deliberation, the jury asked to hear the body wire. RP Vol. 7 at 1030. The prosecutor told the court the jury should hear the entire admitted conversation even though the prosecutor had only chosen to play up to no more than 15 minutes of the 2.5 hour recording during trial. RP Vol. 7 at 1031. Defense counsel agreed to permit the jury to hear the full 2.5 hours. RP Vol. 7 at 1038. Mr. Knox was not consulted. RP Vol. 7 1030-45.

The State did not move to reopen its case and allow the public to hearing the entire 2.5 hour body wire recording. RP Vol. 7 1030-1045.

The court moved the jury from the deliberation room into the courtroom, locked the door to prevent public access to the deliberating jury, and advised the jury they could only listen to the body wire recording one time. RP Vol. 7 at 1050-51.

The jury returned its verdict acquitting only of the unlawful imprisonment and two counts of solicitation to commit murder. RP Vol. 7 at 1052-1059; CP 78-84, 171-73.

Mr. Knox, age 60, received a 396 month sentence. RP Vol. 7 at 1123; CP 3.

Mr. Knox appeals all portions of his judgment and sentence. CP 132-44, 186-98.

ARGUMENT

1. The trial court's unjustified closure of the courtroom violated Mr. Knox's right to a public trial.

a. *The federal and state constitutions provide the accused the right to a public trial.*

Public criminal trials are a hallmark of the Anglo-American justice system. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)

(plurality) (outlining history of public trials from before Roman Conquest of England through Colonial times). "A trial is a public event. What transpires in the court room is public property." *State v. Coe*, 101 Wn.2d 364, 380, 679 P.2d 353 (1984), *quoting Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947).

Both the federal and state constitutions guarantee the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ..."); Article I, section 22 ("In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury . . .").

In addition, the public also has a vital interest in access to the criminal justice system. U.S. Const. Amend. I (the First Amendment's guarantees of free speech and a free press also protect the right of the public to attend a trial); Wash. Const. art. I, § 10 ("Justice in all cases shall be administered openly, and without unnecessary delay."). These provisions provide the public and the press a right to open and accessible court proceedings. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). "The public has a right to be present whether or not any party has asserted the right." *Presley v. Georgia*, 558 U.S. 209, 213-15, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complimentary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Id., *quoting In re Oliver*, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

Open public access to the judicial system is also necessary for a healthy democracy, providing a check on the judicial process. *Globe Newspaper*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 572-73 (plurality). Criminal trials may provide an outlet for community concern or outrage concerning violent crimes. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*). When trials are open to the public, citizens may be confident that established, fair procedures are being followed and that deviations from those standards will be made known. *Press-Enterprise I*, 464 U.S. at 508. Openness thus "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the

system." *Id.* at 501. The role of public access to the court system in maintaining public confidence was also noted by the Washington Supreme Court:

> We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.

Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

Whether the trial court violated the defendant's right to a public trial is a question of law reviewed de novo. *State v. Paumier*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012).

> *b. In order to close a courtroom, the trial court must analyze whether the closure is appropriate under the five Bone-Club factors.*

The presumption of open, publicly accessible court hearings may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to preserve that interest." *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), *citing Press-Enterprise I*, 464 U.S. at 510; *State v. Strode*, 167 Wn.2d 222, 227, 217 P.3d 310 (2009); *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); *see also Presley*,

130 S.Ct. at 724 (circumstances in which the right to an open trial may be limited "will be rare," and "the balance of interests must be struck with special care").

The trial court must articulate an "overriding interest" justifying any limit on a defendant's and the public access, "along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Strode*, 167 Wn.2d at 227. In order to protect the defendant's constitutional right to a public trial, a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *Easterling*, 157 Wn.2d at 175. The five criteria are "mandated to protect a defendant's right to [a] public trial." *In re Personal Restraint of Orange*, 152 Wn.2d 795, 809, 100 P.3d 291 (2004) (emphasis in original).

To determine if closure is appropriate, the trial court is required to consider the following factors and enter specific findings on the record to justify any ensuing closure: (1) the proponent of closure must show a compelling interest and, if based on anything other than defendant's right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the motion is made must be given an

opportunity to object; (3) the least restrictive means must be used; (4) the court must weigh the competing interests; and (5) the order must be no broader in application or duration than necessary. *Bone-Club*, 128 Wn.2d at 258-59; *see also Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36-39, 640 P.2d 716 (1982) (same). The trial court "must ensure" that the "five criteria are satisfied" before closing court proceedings. *Strode*, 167 Wn.2d at 227. *See also Waller*, 467 U.S. at 45 (the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper).

Although a trial court may close all or part of a trial after considering the alternatives, it must "'resist a closure motion except under the most unusual circumstances.'" *State v. Wise*, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012), *quoting Presley*, 130 S.Ct. at 725. The court is required to consider "alternatives to closure" to ensure the least restrictive means of closure is adopted. *Paumier*, 176 Wn.2d at 35; *Wise*, 176 Wn.2d at 10.

> *c. The trial court's closure of the courtroom to even Mr. Knox, without conducting a Bone-Club analysis, to play 2 hours and 15 minutes of new body wire evidence but not otherwise played in an open courtroom violated Mr. Knox's right to a public trial.*

Here, there was no question the courtroom was closed when the jury heard at least 2 hours of new body wire evidence behind closed

doors without even Mr. Knox being present. RP 7 at 1031, 1039, 1040-41. There is similarly no question that the trial court did not conduct the required *Bone-Club* analysis before the jury heard the evidence in a locked courtroom. *See State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) ("[A] 'closure' of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave."). The only remaining question is whether allowing the jury to hear evidence not otherwise made publically available during the trial violated Mr. Knox's right to a public trial.

To determine whether a defendant's public trial right attaches to a particular trial proceeding, this Court applies the "experience and logic" test. *State v. Sublett*, 176 Wn.2d 58, 70-73, 292 P.3d 715 (2012) (plurality). This test consists of two prongs: first, the experience prong asks "'whether the place and process have historically been open to the press and general public.'" *Id.* at 73, *quoting Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (*Press-Enterprise II*). Second, the logic prong asks "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* at 73, *quoting Press–Enterprise II*, 478 U.S. at 8. The guiding principle is "whether openness will 'enhance both the

basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'" *Sublett,* 176 Wn.2d at 75.

When the answer to both prongs is yes, a defendant's public trial right attaches to the particular proceeding. *Id.* at 73. In Mr. Knox's case, the answer is "yes" on both prongs.

The deliberating jury was entitled to its request to once again hear, within the confines of its private deliberation, the body wire evidence played during trial. *State v. Magnano*, 181 Wn. App. 689, 699, 326 P.3d 845 (2014) (jury replaying 911 recording during deliberation does not equate to closed courtroom violation). The jury was not, however, entitled to hear new evidence in a closed courtroom outside of the presence of Mr. Knox or the public. The court thought that during trial, the jury heard just 15 minutes of the body wire. During deliberation, the jury was provided the full 2 hours and 30 minutes recording. RP Vol. 7 at 1040-41.

Mr. Knox did not waive his right to be present at the presentation of the additional body wire evidence. Waiver requires the intentional relinquishment or abandonment of a known right or privilege. *State v. Frawley*, 181 Wn.2d 452, 461, 334 P.3d 1022 (2014). Courts indulge every reasonable presumption against waiver of fundamental rights. *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 86 L.Ed. 680

(1942); *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). The prosecution bears the burden of establishing a valid waiver. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979); *State v. Fort*, 190 Wn. App. 202, 225–26, 360 P.3d 820 (2015), *review denied*, 185 Wn.2d 1011 (2016). Waiver is not established as the prosecutor himself seemed unaware of the obligation to present new trial evidence in a courtroom open to both Mr. Knox and the public.

Here, by contrast to instances when the jury is not hearing evidence, under the experience test, the defendant has an unfettered right to be present during the presentation of evidence to the jury. Similarly, under the logic test, these hearings have been open. The rehearing of testimony by the jury encompasses many of the same rights as the rest of the trial, such as the right of the defendant to be present with counsel and the hearing of testimony by the jury. *Sublett*, 176 Wn.2d at 74. Further, having the jury rehear the testimony or evidence in open court provides greater transparency and appearance of fairness and furthers the goals of the First Amendment and article I, section 22 regarding the openness of criminal trials. Thus, under the logic test, the rehearing or replaying of testimony or evidence by the jury must be done in open court.

Under the experience and logic test enunciated in *Sublett*, the trial court's decision to close the courtroom to Mr. Knox, Mr. Knox's counsel, and the public violated Mr. Knox's right to a public trial.

d. Mr. Knox is entitled to reversal of his conviction and remand for a new trial.

The presumptive remedy for a public trial right violation is reversal and remand for a new trial. *Paumier*, 176 Wn.2d at 35; *Orange*, 152 Wn.2d at 814; *Easterling*, 157 Wn.2d at 179-80. There is no requirement that the defendant prove prejudice when his right to a public trial has been violated. *Paumier*, 176 Wn.2d at 37. Further, there is no de minimus exception to the remedy of reversal. *Easterling*, 157 Wn.2d at 180.

The trial court's error in playing 2-plus hours of new evidence for the jury in the absence of Mr. Knox or the public requires reversal of Mr. Knox's conviction and remand for a new trial.

2. If the State substantially prevails on appeal, any request for appellate costs should be denied.

If Mr. Knox does not prevail on appeal, he requests that no costs of appeal be authorized under Title 14 of the Rules of Appellate Procedure. The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party on appeal. *State v. Sinclair*, 192 Wn. App. 380, 391, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016); RCW 10.73.160(1) (the "court of appeals . . . may require an

adult . . . to pay appellate costs."). Imposing costs against indigent defendants raises problems well documented in *Blazina*: "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). *Sinclair* recognized the concerns expressed in *Blazina* applied to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. *Sinclair*, 192 Wn. App. at 391.

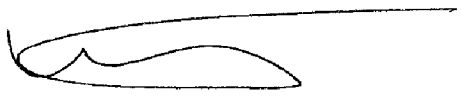
The trial court found Mr. Knox qualified for indigent defense on appeal. Supplemental Designation of Clerk's Papers, No. 14-1-00095-0, Order of Indigency (sub. nom. 95). If Mr. Knox, 60-years old at sentencing, does not prevail on appeal, he will be 93-years old before completing his 396 month sentence.

Importantly, there is a presumption of continued indigency through the review process. *Sinclair*, 192 Wn. App. at 393; RAP 15.2(f). As in *Sinclair*, there is no trial court order finding Mr. Knox's financial condition has improved or is likely to improve. *Sinclair*, 192 Wn. App. at 393. Given the serious concerns recognized in *Blazina* and *Sinclair*, this court should soundly exercise it discretion by denying the State's request for appellate costs in this appeal involving an indigent appellant.

CONCLUSION

The court should reverse all of Mr. Knox's convictions. Alternatively, this court should not impose any appellate costs on Mr. Knox if the State substantially prevails on appeal.

Respectfully submitted September 6, 2016.



LISA E. TABBUT/WSBA 21344
Attorney for Bradley Knox

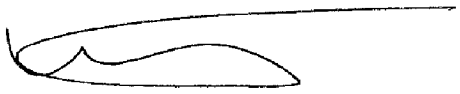
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Cowlitz County Prosecutor's Office, at appeals@co.cowlitz.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Bradley Knox/DOC#266401, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed September 6, 2016, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Bradley Knox, Appellant

LISA E TABBUT LAW OFFICE

September 06, 2016 - 4:23 PM

Transmittal Letter

Document Uploaded: 7-484731-Appellant's Brief.pdf

Case Name: State v. Bradley Knox
Court of Appeals Case Number: 48473-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lisa E Tabbut - Email: ltabbutlaw@gmail.com

A copy of this document has been emailed to the following addresses:

appeals@co.cowlitz.wa.us